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No. 88-1348

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LEONA M. HELMSLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CORRECTED COPY

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONER

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One must be careful . . . not to play word games with the concept of a 'right not to be tried'." *Midland Asphalt Corp. v. United States*, No. 87-1905 (March 28, 1989), Slip Op., at 7.

The government solemnly reminds us of this warning recently issued in the *Midland Asphalt* case, and then promptly proceeds to play "word games."

First, the government portrays the facts of this case as if they involved only a claim by petitioner "that the grand jury that indicted her had *made use* of certain immunized testimony that she had previously given before a New York State grand jury." Brief in Opp., at 2 (emphasis supplied). This erroneous formulation neatly obscures the simple truth that petitioner's claim goes beyond mere "use" of immunized testimony by her grand jury. Indeed, *supported by an admission from the prose-*

cutor, petitioner presented powerful evidence below that the entirety of this prosecution is fatally flawed because she was targeted for investigation and prosecution only as a result of her immunized testimony before a state grand jury.[1] In short, but for the use by federal officials of her state immunized testimony, before there even was federal grand jury, this federal prosecution would not have commenced. That is the core of petitioner's claim and, as set forth below, it establishes a true "right not to be tried."[2]

Second, the government, again purporting to rely on *Midland Asphalt*, observes that that ". . . nothing in the Self-Incrimination Clause of the Fifth Amendment . . . affords petitioner a right not to be tried, even if her allegations of misuse of immunized testimony were true." Brief in Opp., at 6. The "word game" reflected in this observation takes somewhat longer to expose but the following shows that it is just that:

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[1] As noted in Petitioner's opening brief, the chief prosecutor in this case has acknowledged that a news article, which was part of a series of articles commenting on the subject of petitioner's immunized testimony, "preceded and precipitated" the federal investigation of the matters "charged in this indictment."

[2] The government correctly observes that this is the second interlocutory appeal taken in this case. Brief Opp., at n.2. If that observation is intended as implied criticism, rebuttal is easy.

The first petition concerned an issue which this Court had already deemed worthy of review by granting *certiorari* in *Midland Asphalt*, as to whether violations of Fed. R. Crim. P. 6(e) that prejudice the right to an unbiased grand jury are subject to interlocutory review. *See Helmsley, et ux. v. United States*, Petition No. 88-732. That petition was founded on a record which the trial court itself described as indicating that this prosecution is "rife with Rule 6 violations."

As to this current petition, the government notes that the courts of appeals have permitted deferral of *Kastigar* hearings until after trial. None of the cases, however, involved a claim that an entire prosecution was wrongfully triggered by immunized testimony, as this one was.

Midland Asphalt teaches how to determine whether a defendant's claim entails a true right not to be tried. A claimed right can be so classified only if it "rests upon an explicit statutory or constitutional guarantee that trial will not occur." Slip. op., at 8. For example, a Double Jeopardy claim entails the right not to be tried because it rests upon the guarantee of the Double Jeopardy Clause that no person shall be "twice put in jeopardy"—i.e., be put to trial a second time—for the same offense. *Abney v. United States*, 431 U.S. 651 (1977). Likewise, a Speech and Debate claim to freedom from trial rests upon the assurance given in that clause that no Congressional speech or debate "shall . . . be questioned in any other place." *Heltoski v. Meanor*, 442 U.S. 500 (1979). In short, both claims rest upon specific Constitutional language that appears to preclude trial itself, not merely to guarantee post-trial reversal if the right at issue is denied.

The claim in this case also rests upon specific language, derived from the Fifth Amendment, that establishes a right not to be tried. But because the claim here involves an immunity-compelled relinquishment of the Fifth Amendment privilege, it is no wonder that the specific language is not found in the Fifth Amendment's privilege provision. Instead, consistent with the substitution of immunity for the Fifth Amendment privilige, the right not to be tried in this case derives from the "provision" this Court has decreed must be substituted for the Fifth Amendment language when the privilege is ousted by an immunity grant. When that happens, this Court has held that such compelled substitution is consistent with the Constitution only if the grant of immunity leaves the witness "in substantially the same position as if the witness had claimed the Fifth Amendment privilege." [3]

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[3] *Kastigar v. United States*, 406 U.S. 441, 462 (1972); *see also Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964).

It follows inexorably that if the prosecution and trial of a defendant, compelled to testify under immunity, would not have occurred in the absence of that compelled testimony, permitting the prosecution to proceed through trial does not leave the defendant in the same position she would have been in if permitted to maintain the privilege. Under these circumstances, therefore, a defendant has a "right not be be tried" because the trial itself—whether or not a conviction ensues—would violate the defendant's rights under the Fifth Amendment.

It should not be forgotten that this case falls into a very special category of immunity cases. It is not a barebones claim of abuse that, as the government suggests, *see* Brief in Opp., at 3, could open the floodgates to interlocutory review of all immunity claims. Here petitioner has compiled powerful *prima facie* evidence that her compelled, immunized testimony was the seed from which *all* of this case grew. Indeed, contrary to the government's characterization of it, the pending petition does not present a claim that all violations of a grant of immunity entail a right not to be tried. A case of isolated use of immunized testimony, or even extensive use of immunized testimony, is wholly different from facts like these where a defendant has become a target of an investigation *only* because of immunized testimony.[4]

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[4] For this reason, this petition is wholly distinguishable from the matters governed by *Lawn v. United States*, 355 U.S. 339, 349 (1958). In *Lawn*, the defendants had been subpoenaed, produced documents, and given testimony before a grand jury without being informed of their privilege against compelled self-incrimination. The resulting indictments from that grand jury were dismissed. The *Lawn* defendants were then indicted by another grand jury and convicted. On appeal, they challenged the district court's failure to conduct a pre-trial hearing as to whether the improperly obtained evidence in the first grand jury had been used in the second action. This Court held that the *Lawn* defendants had presented no evidence of taint of the second grand jury to merit a hearing prior to trial. In this case, by contrast, petitioner has established strong

Where a prosecution would not have occurred but for compelled, immunized testimony from the accused, reversal of a conviction simply does not afford protection co-extensive with the Fifth Amendment itself. *See Kastigar*, 406 U.S. at 460-61. If *prosecution* would not have occurred but for violation of the privilege, only freedom from trial is co-extensive with the privilege. It is for this reason that, as in *Double Jeopardy* cases, the protection guaranteed by the Fifth Amendment under these circumstances is a right "the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978).

Accordingly, interlocutory review is required because, as the government concedes, all the requirements of the collateral order doctrine are met when a true claim of a right not to be tried has been denied.

CONCLUSION

To vindicate both the particular Fifth Amendment rights at stake here and the meaning of *Midland Asphalt*, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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prima facie evidence of taint *in toto*, including clear evidence, some of it admitted, that she was targeted *only* as a result of her immunized testimony.